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Commissioner

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IN THE MATTER OF THE GENERIC
PROCEEDINGS CONCERNING
ELECTRIC RESTRUCTURING

DOCKET NO. E-00000A-02-0051

IN THE MATTER OF ARIZONA
PUBLIC SERVICE COMPANY'S
REQUEST FOR VARIANCE OF
CERTAIN REQUIREMENTS OF A.A.C.
4-14-2-1606

DOCKET NO. E-01345A-01-0822

IN THE MATTER OF THE GENERIC
PROCEEDINGS CONCERNING THE
ARIZONA INDEPENDENT
SCHEDULING ADMINISTRATOR

DOCKET NO. E-00000A-01-0630

IN THE MATTER OF TUCSON
ELECTRIC COMPANY'S
APPLICATION FOR A VARIANCE OF
CERTAIN ELECTRIC POWER
COMPETITION RULES COMPLIANCE
DATES

DOCKET NO. E-01933A-98-0471

ISSUES IN THE MATTER OF TUCSON
ELECTRIC POWER COMPANY'S
APPLICATION FOR A VARIANCE OF
CERTAIN ELECTRIC COMPETITION
RULES COMPLIANCE DATES

DOCKET NO. E-01933A-02-0069

**REPLY OF PANDA GILA RIVER, L.P. TO
ARIZONA PUBLIC SERVICE COMPANY'S RESPONSE TO
REQUEST FOR ORDER TO SHOW CAUSE**

Panda Gila River, L.P. ("Panda") hereby replies to the Response to Request for Order to Show Cause ("APS Response") filed by Arizona Public Service Company ("APS") on March 29, 2002.

1 As noted by Commissioner Spitzer in his letter of March 26, 2002, "the issues raised [in
2 Panda's Request] go to the heart of the Request for Variance that initiated this docket." APS, on
3 the one hand, contends that the Purchase Power Agreement ("PPA") between APS and Pinnacle
4 West Capital Corporation ("PWCC") necessarily will provide greater benefits to APS's
5 ratepayers than could *any* agreements reached through arms-length negotiations with competitive
6 suppliers.¹ Panda believes, on the other hand, that it makes no sense to litigate in a Commission
7 hearing room whether competitive offers would be forthcoming, were they to be requested, when
8 this question could be answered simply and definitively through the issuance of a real RFP.
9 Thus, as Commissioner Spitzer recognized "[t]he factual demonstration of an RFP process would
10 appear to resolve (one way or the other) the core issue in this case." Commissioner Spitzer Letter
11 at 2. A true RFP, in contrast to the RFP-by-litigation proposed by APS, will determine whether
12 sufficient wholesale competition exists to supply APS's Standard Offer Service requirements. In
13 this way, the Commission can best assure that APS's ratepayers get the best deal available and
14 promote the continued development of the competitive wholesale market, while simultaneously
15 preserving Commission and Intervenor resources.

16 **THE BEST WAY TO DETERMINE IF COMPETITION EXISTS IS TO SEEK**
17 **COMPETITIVE BIDS.**

18 In its Request for Order to Show Cause, Panda noted that, in order to sustain its request
19 for variance, APS will have to show, as a practical matter, that even if it were to issue an RFP, no
20 individual or group of suppliers other than PWCC could meaningfully respond with an offer for
21 all or a portion of APS's projected Standard Offer Service requirements on terms that are as or
22 more attractive than those contained in the APS/PWCC PPA. Panda also noted conversely that
23 those parties who opposed the variance would, as a practical matter, attempt to show that APS,
24
25

26 ¹ In the meantime, APS also states in its Response, that the PPA terms are not necessarily what it would bid in a competitive RFP. APS Response at 5.

1 indeed, can competitively procure its Standard Offer Service requirements. Not surprisingly,
2 intervenors' and Staff's direct testimony, among other things, made precisely these points.²

3 APS objects to Panda's suggesting an RFP on the grounds that this is "yet another
4 delaying tactic;" that an RFP is not possible until APS divests its generation; and that, in any
5 event, any RFP would be meaningless because the PPA cannot even be directly compared to a
6 competitive bid. APS utterly fails, however, to address, much less rebut, the simple proposition
7 that the best way to determine whether it makes sense to forsake the market and to accept the
8 PPA is to first determine whether alternatives to the PPA would be forthcoming. Clearly, the best
9 way to see if non-affiliated suppliers can offer attractive alternatives to the PPA is to ask them,
10 rather than to presume, or seek to prove in an administrative setting, that they could not. And the
11 best way to ask them is not through discovery or cross-examination, but by issuing an objectively
12 fashioned RFP. As summed up by Commissioner Spitzer, an RFP would require generators to
13 "put up or shut up" and would determine with certainty whether a sufficiently competitive market
14 exists so as to justify requiring APS to secure all or a substantial portion of its requirements from
15 the market as *in fact* the Commission's Competition Rules contemplate.

16 Amazingly, rather than disputing that going to the market is the best way to determine
17 what market exists for APS to satisfy its requirements, APS argues that it should first be allowed
18 to prove that its requested exemption from Rule 1606 is in the public interest by presenting
19 "actual evidence on whether bidding pursuant to Rule 1606(B) may or may not work." APS
20 Response at 7. But why litigate whether bidding can work when, if APS is required to conduct an
21 RFP, the Commission can determine with certainty whether it "works." APS simply cannot avoid
22 the inescapable fact that an RFP would provide far more certainty regarding the effectiveness of
23 competitive bidding than would a battle of expert witnesses, each opining on whether, in their

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25 ² Panda, for example, presented two witnesses to support its claim that merchant generators were willing and able to
26 sell power to APS. Harquahala Generating Company, LLC presented witnesses supporting competitive bidding
generally and the Arizona market specifically. Sempra Energy Resources also presented testimony indicating that it
was willing and able to sell power to APS. Commission Staff presented testimony on the perceived depth of the
Arizona wholesale market, and the ability of generators to sell into this market.

1 respective opinions, a competitive bidding process likely would “work,” and whether the market
2 can or cannot support APS’s requirements. And if sufficient competitive generation did bid to
3 serve a large portion of APS’s Standard Offer Service requirements, the primary justification for
4 the variance request would disappear. This is precisely why Commissioner Spitzer was right to
5 conclude that “the issues raised [in Panda’s Request] go to the heart of the Request for Variance
6 that initiated this docket.” Commissioner Spitzer letter at 2.

7 APS asserts that if Panda’s request is approved, “it would force APS to simultaneously
8 prove that its variance request is in the public interest, while attempting to draw out the details for
9 a future process that is itself dependent on the resolution of APS’s underlying request.” APS
10 Response at 7. Again, APS completely misses the point. Both the proposed RFP and APS’s
11 variance request are premised on the same question – can the competitive market supply
12 economical, reliable power to fulfill APS’s Standard Offer Service requirements? Any hearing
13 on APS’s variance request must attempt to address this issue: APS’s request is only in the public
14 interest if the market cannot supply reliable power to meet APS’s requirements.

15 In short, if APS receives one or more *bona fide* competitive bids, the Commission should
16 reject the variance request and the proposed PPA outright, or at least stay the variance proceeding
17 until such time as it can determine whether a sufficient number of third party bids were submitted,
18 and whether any such bids, individually or in combination, can reliably meet some or all of APS’s
19 requirements. At the same time, if a competitive market is demonstrated, any alleged justification
20 for the thirty-year, affiliate PPA would then evaporate, and the Commission’s original decision to
21 require competitive procurement of APS’s Standard Offer Service requirements would then have
22 been objectively justified, and fully vindicated.

23 Finally, even if bids submitted were not sufficient to satisfy APS’s requirements,
24 the Commission still would have exactly the information it would need to determine what,
25 if any, modification of the Competition Rules would be appropriate should the RFP
26 evidence indicate that the market is not yet sufficiently developed. The Commission

1 would then have whatever evidence it needed to conclude, for example, that the Rules
2 only need be modified to permit a short term affiliate PPA until sufficient competitive
3 alternatives are available. The Commission need not make, as APS claims, the stark all-
4 or-nothing choice between ordering that 100% competitive procurement be allowed to
5 proceed immediately, or accepting a thirty-year affiliate contract as though real
6 competition never would develop or that, for example, an RFP issued two years from now
7 could not possibly result in numerous competitive offers.

8 **IT IS EXTREMELY UNLIKELY THAT AN RFP WOULD NOT RESULT IN**
9 **NUMEROUS COMPETITIVE PROPOSALS.**

10 In other states where RFPs have been used, both for supply of Standard Offer Service
11 requirements and other power requirements, RFPs have been successful, often resulting in
12 substantially more bids than originally anticipated. For example, Maine requires utilities to
13 procure all Standard Offer Service power through competitive bidding. 35-A M.R.S.A. § 3212.³
14 Similar competitive bidding processes were used to procure Standard Offer Service requirements
15 or establish a provider of last resort for retail electric service in Massachusetts,⁴ Rhode Island⁵
16 and New Jersey⁶. The New Jersey commission expressed confidence that an auction could be
17 used to procure up to 18,000 MW of competitive generation.⁷

18 ³ See, e.g., *Order Designating Standard Offer Provider and Directing Utilities to Enter Entitlements Agreements*,
19 Maine PUC Docket No. 2001-399 (September 18, 2001) (<http://www.state.me.us/mpuc/orders/2001/2001-399odsop.pdf>) (declaring Constellation Power Source to be the Standard Offer Service provider for two IOUs for a
20 three year period at 4.950 cents per kWh); see also *Re Standard Offer Bidding Process*, Maine PUC Docket No.
21 2000-808 (December 19, 2000) (<http://www.state.me.us/mpuc/orders/2000/2000-808ods.pdf>) (designating WPS-
22 Energy Services, Inc. as the Standard Offer Service provider for Maine Public Service Company's requirements for a
23 three-year period because it would provide long-term price stability).

24 ⁴ See *Western Massachusetts Elec. Co.*, D.T.E. 97-120 (Sept. 17, 1999) (<http://www.state.ma.us/dpu/electric/97-120/order.htm>) (approving RFP process and establishing guidelines, allowing bids for 25% to 100% of utility's
25 requirements).

26 ⁵ See *Re Narragansett Elec. Co.*, RI PUC Docket No. 3005, Order No. 16638 (June 14, 2001)
(<http://www.ripuc.org/order/pdfs/NEC3005Ord16638.pdf>) (approving final bid selected through RFP process
conducted in 14 days).

⁶ See *I/M/O Atlantic City Electric Company – Rate Unbundling, Stranded Cost and Restructuring Filings*, Docket
Nos. EO97070455, et al. (July 15, 1999) (<http://www.bpu.state.nj.us/wwwroot/energy/acesumord.pdf>) (providing that
Atlantic City Electric Company will procure power through an open, competitive bidding process).

⁷ See *The Provision of Basic Generation Service Pursuant to the Electric Discount and Energy Competition Act*,
N.J.S.A. 48:3-49, et seq., Docket Nos. EX01050303, et al. (Dec. 11, 2001).
(<http://www.bpu.state.nj.us/wwwroot/energy/EX01050303aORD.pdf>).

1 Other utility RFPs have received almost overwhelming responses. For example, in
2 January 2000, Public Service Company of Colorado (PSCo) issued an RFP for 1,365 MW.
3 See Direct Testimony of Craig R. Roach at 7. In response, PSCo received 50 bids totaling
4 9,000 MW. PSCo decided to accept 12 bids totaling 1,995 MW, 46% more megawatts
5 than it had originally sought. *Id.* Likewise, Nevada Power announced two long-term
6 agreements with third-party suppliers on March 22, 2002 that it concluded could reduce a
7 requested rate increase of over 20% to 8.8%.⁸ There simply is no reason to guess or even
8 to litigate whether APS would likewise receive multiple bona fide offers to supply all or a
9 portion of its Standard Offer Service requirements. All it need do is issue an RFP, which
10 it now concedes can be done reasonably quickly,⁹ and the answer will be known.

11 **APS CANNOT ARGUE ITS ACTIONS ARE PRUDENT WITHOUT MAKING SOME**
12 **EFFORT TO DETERMINE WHAT IS AVAILABLE FROM THE COMPETITIVE**
13 **MARKET.**

14 While not articulated in Arizona law to the degree APS appears to require, it is hard to
15 imagine APS disagreeing with the proposition that it must demonstrate its PPA to be prudent; and
16 that in undertaking its prudency review, the Commission will determine if the PPA is reasonable
17 and in the best interests of APS's ratepayers.¹⁰ Indeed, the direct testimony submitted by
18 Commission Staff in this docket on March 29, 2002, repeatedly refers to Staff's concerns
19 regarding the prudency and reasonableness of the PPA. See Direct Testimony of Staff Witness
20 David A. Schlissel at 8-10. Although nothing in Arizona law explicitly mandates that APS
21 conduct an RFP to demonstrate that the PPA is prudent, APS's concession that it did not consider
22 other options when negotiating the PPA, Davis Deposition Transcript at 48 (attached hereto at

23 ⁸ Three days later, one of these suppliers, Williams Energy, announced it had entered into
24 exclusive negotiations with Nevada Power on an even broader arrangement involving fuel
supply, new assets, and risk management. See Direct Testimony of Craig R. Roach at 7.

25 ⁹ See Davis Deposition Transcript at 111, attached hereto at Tab 1.

26 ¹⁰ See, e.g., *In the Matter of the Commission's Investigation Into Palo Verde Nuclear Generating Station
Construction Costs*, Decision No. 54250 (Dec. 4, 1984)(in which the Commission commenced its review of the
prudency of Palo Verde to determine if construction costs should be included in ratebase).

1 Tab 1), underscores that the only conceivable way to establish the PPA's prudence is for APS to
2 test it against the results of a properly designed and fair RFP.

3 **PANDA'S REQUEST WOULD NOT DELAY THE TIME IT TAKES TO CONCLUDE**
4 **THE PROCEEDING.**

5 Panda is not seeking either to block or to delay adjudication of APS's variance
6 request. Rather, Panda is arguing that, on the basis of the testimony and discovery that
7 has been filed to date, any modification of, or exemption from, Rule 1606 is premature
8 absent the issuance of an RFP. Panda has asked a simple question which APS just does
9 not want to answer. Instead of asserting that competition does not exist and then holding
10 a hearing to allow competitors to challenge the assertion, why shouldn't APS simply
11 conduct an RFP to determine whether meaningful competition exists, and only then, if
12 necessary, examine alternatives to competitive procurement?

13 The Commission's concern should not primarily be over whether adjudication of
14 the variance is delayed, but over whether APS's ratepayers might best benefit by APS's
15 first conducting an RFP. The uncontested fact is that APS has never taken a single action
16 to determine if sufficient competition exists. APS failed to issue an RFP; there is no
17 evidence that it engaged in bilateral negotiations with competitive suppliers; and it has
18 conceded that it did not even consider any alternatives to the PPA before engaging in
19 several months of negotiations essentially with itself. Davis Deposition Transcript at 48,
20 attached hereto at Tab 1.

21 In any event, it is likely that Panda's request will be more efficient, will take less
22 time and cost less money than APS's proposed RFP-through-litigation. Under APS's
23 proposal, parties would testify in the hearing to their intent to offer power to APS (after
24 also doing so in response to data requests). If the Commission determines that
25 competition exists, and therefore rejects the variance request and proposed PPA, APS still
26 will have to issue an RFP to comply with the Competition Rules. Indeed, even under the
PPA itself, APS is required to issue an RFP for a portion of its requirements. Hence,

1 APS's process will thus take longer and be more expensive. If, however, the Commission
2 delays the hearing, little additional time will be required, even if an RFP produces no bids
3 (thus still requiring the hearing to evaluate the PPA). APS alternately claims that an RFP
4 would take "the better part of a year," (Variance Request at 8) or six months (Davis
5 Deposition Transcript at 111, attached hereto at Tab 1). Both of these estimates, however,
6 include the time to evaluate bids. An RFP that produces no bids would take considerably
7 less time, at most two months.¹¹ And, if no meaningful bids are received, as APS insists
8 would be the case, the variance hearing would be far shorter than it otherwise would have
9 been and the decisional time dramatically reduced given the reduced scope of the
10 inquiry.¹²

11 **THE RFP CAN BE ISSUED BEFORE APS DIVESTS ITS GENERATION AND PANDA'S**
12 **REQUEST IN NO WAY PREJUDGES THE RFP PROCESS THAT SHOULD BE**
UNDERTAKEN.

13 According to APS, because it has not yet completed transfer of its generating assets
14 to Pinnacle West Energy Company ("PWEC"), it cannot conduct an RFP. This is plainly
15 wrong. It is true that the competitive procurement of Standard Offer Service requirements
16 and the divestiture are in some fashion linked. It simply is untrue, however, that an RFP
17 cannot go forward until divestiture is completed.

18 As a matter of common sense, if competitive procurement of Standard Offer
19 Service requirements and divestiture of generation were both to be effective as of January
20 1, 2003, then clearly it was contemplated that the RFP would have been issued before the
21 divestiture closed, and any contracts resulting from that process would have been made

22
23 ¹¹ See Panda Request at 8, *citing* Virginia experience.

24 ¹² Panda is requesting that the hearing in this matter be stayed and that APS be directed to issue an RFP. Such relief
25 was not requested in the Alliance Brief cited at pages 8-9 of APS's Response, and APS cannot point to any portion of
26 that brief to the contrary. Rather, the Alliance Brief and the ALJ's February 8, 2002 Order were limited to
establishing the appropriate procedural mechanisms for the Commission's consideration of APS's requested
variance. Accordingly, neither the fact that the Alliance also maintained that APS should be required to take certain
actions necessary to allow for timely compliance with Rule 1606(B) in the event the variance is rejected, nor the
ALJ's ensuing Order, are even remotely dispositive on Panda's contention here that the hearing in this matter may
not even be necessary following an RFP.

1 contingent upon APS transferring its generation facilities to PWEC, just as the PPA itself
2 is conditioned on completion of the asset transfer, as well as on the Commission's
3 approving the PWEC/PWCC Agreement that also contemplated the eventual asset transfer
4 to PWEC.

5 Finally, APS also is wrong in accusing Panda of attempting to prejudge the design
6 of the RFP, which APS claims will require the Commission to initiate a rulemaking. APS
7 Response at 5. First, APS does not cite to, nor is Panda aware of, any legal precedent to
8 support this proposition. Furthermore, APS surely would agree that had it not sought a
9 variance from Rule 1606(B), it would have issued an RFP, evaluated the responsive bids
10 and executed contracts with the winning bidder, all without requiring a Commission
11 rulemaking. In this instance, all Panda is asking is that the Commission oversee the RFP
12 process (to be administered by an independent third party), solely to ensure that APS,
13 which does not want to conduct the RFP in the first place, does not game the process or
14 otherwise render the PPA a self-fulfilling prophecy.

15 **RESPONSIVE BIDS TO THE RFP CAN EASILY BE COMPARED WITH THE PPA.**

16 Despite APS's assertion that an RFP would be a pointless exercise, as "one cannot
17 meaningfully compare" the PPA with whatever bids are received in response to the
18 solicitation, APS Response at 6,¹³ comparison of the PPA with proffered testimony
19 regarding potential competitive bids is exactly what will have to occur, in a non-
20 commercial context, in the hearing in this proceeding. Furthermore, as Panda noted in its
21 original Request, APS issued identical data requests to all merchant intervenors, seeking
22 precisely the type of information that would be sought in an RFP. If meaningful
23 comparison of competitive bids to the RFP is impossible, APS's data requests were
24 pointless; and presumably the comparison is no more meaningless today than when
25 1606(B) was promulgated. In fact, though, APS's view is that an RFP could not possibly

26 ¹³ APS is well aware that Panda can deliver far more than 500 MW, and would not need to do so through Palo Verde, as APS intimates in its Response.

1 result in a better deal for its ratepayers regardless of how many parties bid into the RFP.
2 But the PPA merely represents a collection of generation resources, so comparison to a
3 different portfolio of resources should be a relatively simple matter. In fact, when Panda
4 did perform this comparison, it demonstrated that the PPA is a *worse* deal for Arizona
5 ratepayers than is an optimal competitive portfolio. See Direct Testimony of Craig R.
6 Roach at 39.

7 Nevertheless, any concerns about adequacy or comparability of bids is
8 appropriately dealt with through RFP development and bid assessment. If APS
9 reasonably believes certain characteristics for Standard Offer Service power supply are
10 mandatory, it should not be difficult to persuade the Commission, or an independent third
11 party, that such characteristics should be included in the RFP. If APS reasonably believes
12 that geographic diversity or fuel diversity or reliability guarantees are important, it can
13 build such characteristics into a draft RFP scoring process in order to ensure that the
14 resulting power portfolio addresses diversity and reliability. If APS believes that its offer
15 is clearly superior, it should not hesitate to bid its PPA, given its confidence that its offer
16 ultimately will win. None of APS's contentions, however, are any more compelling here
17 than in any other part of the country, where large numbers of ratepayers no longer are
18 served directly, or via standard offer service obligations, by incumbent utilities.¹⁴

19 **GIVEN THAT FERC APPROVAL OF THE PPA IS UNCERTAIN, AT BEST, AND**
20 **GIVEN THAT THE PPA WILL NOT BE EFFECTIVE UNTIL SUCH TIME AS IT IS**
21 **APPROVED BY FERC, ANY REMAINING SCHEDULING CONCERNS ARE**
IMMATERIAL.

22 APS's insistence that its grant of market-based rate authority totally insulates the
23

24 ¹⁴ APS claims that Panda's Request is legally premature, because APS has not violated Rule 1606(B). But, the
25 Commission should order APS to conduct an RFP now, whether or not it believes APS intends to comply with the
26 Rule. Again, Panda's Request is grounded on the inescapable conclusion that an RFP will allow the Commission to
evaluate the state of the Arizona market with certainty, and avoid having to rely on a quasi-RFP through discovery
and litigation. For purposes of the Request, then, it is irrelevant whether APS is or is not (as Panda nonetheless
believes to be the case) presently violating 1606(B).

1 PPA from FERC review is at odds with FERC precedent, and will no doubt be of great
2 interest to FERC. APS wrongly construes *GWF Energy LLC*, 97 FERC ¶ 61,297 (2001)
3 (“GWF Energy”) to hold that agreements entered into by parties with market-based rate
4 authority are not subject to FERC review because they are filed with FERC for
5 “informational” purposes only. But although parties that enter into agreements pursuant
6 to their grant of market-based rate authority need not file a separate Section 205
7 application, *GWF Energy* does *not* hold that such agreements are exempt from FERC
8 review.¹⁵ On the contrary, as FERC clarified in its rehearing of *GWF Energy*, 98 FERC ¶
9 61,330 (2002), “[w]hile we characterized such agreements as ‘informational’, we did not
10 intend to suggest that we are not required to make any determination concerning such
11 filings,” *Id.*, *mimeo* at 5 (emphasis in original). Nowhere did FERC disclaim
12 responsibility substantively to review such agreements if, for example, they are
13 inconsistent with the initial grant of market-based rate authority or any other FERC policy
14 or provision of the FPA, *see id.* at 6;¹⁶ and as FERC also noted in *GWF Energy*, third
15 parties always have the option to file a complaint bringing to FERC’s attention any
16 evidence of affiliate abuse, or otherwise challenging the reasonableness of continuing the
17 underlying market-based rate authority. *See id.* at 7.

18 Consequently, FERC’s approval of the PPA is highly doubtful, unless APS can
19 demonstrate that the PPA is the least cost alternative and is otherwise consistent with
20 FERC’s clear policy regarding affiliate transactions, as articulated in *Boston Edison Co.*
21 *Re: Edgar Elec. Co.*, 55 FERC ¶ 61,382 (1991) and its progeny (“*Edgar Electric*”).
22 Without conducting an RFP to test the PPA, however, it is not clear why APS believes it
23 will be able to make such a showing.¹⁷

24 ¹⁵ APS certainly cannot be suggesting that any agreement, even one, for example, that is the product of affiliate abuse
25 or collusion, is exempt from FERC review.

26 ¹⁶ In addition, as FERC noted in *GWF Energy*, it reserves the right to require a market analysis at any time. *See GWF*
Energy, 98 FERC, *mimeo* at 6 n.14.

¹⁷ Indeed, with respect to APS’s authority to enter into market-based rate agreements with its affiliate, FERC has
specifically noted that third parties will be able to allege affiliate abuse in filings with FERC, stating “[w]e would, of

1 Finally, FERC substantively reviews even voluntarily filed agreements. *See Ocean*
2 *State Power*, 63 FERC ¶ 61,072 at 61,314 n.25 (1993) (subjecting voluntary filing of
3 yearly rate of return calculations to the same standards applicable to the FERC-mandated
4 filing).¹⁸ Therefore, given that the PPA itself requires FERC approval, APS will have to
5 demonstrate that the PPA is consistent with *Edgar Electric*. In short, notwithstanding
6 APS's grant of market-based rates, APS has two choices: prepare for FERC review by
7 proceeding with the RFP, or prepare for delay in receiving FERC approval because it
8 failed to perform the RFP.

9 CONCLUSION

10 Unless the Commission requires APS to undertake an RFP, it cannot possibly
11 assure itself that any contract between APS and its affiliate would in fact be prudent from
12 the standpoint of APS's ratepayers, or be likely to be accepted by the FERC.
13 Furthermore, if APS were to issue an RFP, the question as to whether the contract
14 between APS and its affiliates is even necessary will be answered. The end result will be
15 that APS either will have competitively procured wholesale power contracts for Standard
16 Offer Service, as contemplated by Rule 1606(B), or the bidding process will prove that
17 some form of affiliate PPA is appropriate, and will fashion that affiliate agreement that
18 best provides for APS's ratepayers. Either way, the need for the Commission to hold a
19 lengthy hearing will be obviated, and an RFP process, therefore, would take no more time
20 to conclude than would the Commission's proceeding to hear and rule on APS's request

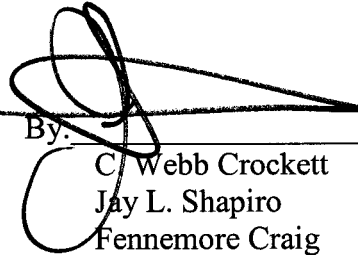
21 course, be concerned if affiliates authorized to transact at market-based rates were to engage in behavior that resulted
22 in harm to captive customers at the benefit of shareholders and would adopt an appropriate remedy if determined
23 necessary." *See Pinnacle West Energy Corp.*, 95 FERC ¶ 61,301, 62,026 (2001).

23 ¹⁸ *See also GEN~SYS Energy*, 81 FERC ¶ 61,045 (1997) (in which a cooperative with no generation assets
24 voluntarily submitted to FERC review in order to sell power at market-based rates). FERC also frequently reviews
25 mergers that may not be subject to Section 203 of the FPA because the parties to the merger voluntarily make filings
26 before FERC. FERC does not review these mergers any differently than it reviews those that are subject to its
jurisdiction. *See, e.g., Elwood Energy LLC*, 96 FERC ¶ 62,059, 64,115 (2001); *Nevada Sun-Peak Limited*
Partnership, 87 FERC ¶ 62,303, 64,513 (1999) (both stating that because the parties consent to FERC jurisdiction,
such jurisdiction is assumed; both applications were then reviewed to ensure consistency with Section 203 policy);
see also Ocean State Power, 47 FERC ¶ 61,321, 62,130 (1989); *Ocean State Power*, 43 FERC ¶ 61,466 (1988); and
National Elec. Assoc. L.P., 80 FERC ¶ 62,116 (1997).

1 for a partial variance on the schedule currently contemplated.

2 RESPECTFULLY SUBMITTED this 5th day of April, 2002.

3 FENNEMORE CRAIG

4 
5
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1 BEFORE THE ARIZONA CORPORATION COMMISSION

2

3

4 IN THE MATTER OF THE ARIZONA) DOCKET NO.
5 PUBLIC SERVICE COMPANY'S) E-01345A-01-0822
6 REQUEST FOR VARIANCE OF)
CERTAIN REQUIREMENTS OF A.A.C.)
R14-2-1606.)
7

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DEPOSITION OF JACK E. DAVIS

14

Phoenix, Arizona
March 25, 2002

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**DISK
ENCLOSED**

ARIZONA REPORTING SERVICE, INC.

Court Reporting

Suite Three

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Phoenix, Arizona 85004-1103

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23

By: CAROLYN T. SULLIVAN, RPR
Certified Court Reporter
Certificate No. 50528

24

Prepared for:

25

PANDA GILA RIVER

**CERTIFIED COPY
(When in red)**

ARIZONA REPORTING SERVICE, INC.
Realtime Specialists

(602) 274-9944
Phoenix, AZ

1 A. Yes. We sponsor -- this is kind of showing
2 some of the accolades from our other operating
3 projects.

4 We sponsor local teams.

5 We're actively participating in
6 organizations.

7 We sponsor educational scholarships.

8 And we provide emergency relief.

9 And we're also a good neighbor.

10 I think Jeff outlined that the Brandywine
11 facility outlines weekly time to go over to the
12 elementary schools. I think what's important is these
13 kids need direction. And when we can provide
14 something that you could go touch and feel and see
15 what technology is going to do, we may turn some kids
16 on that may want to work harder and help grow their
17 community. So we're pretty excited about this.

18 Q. Mr. McDaniel, do you believe that this
19 project site and the planning process that Panda has
20 undertaken meets the requirements of the statute to
21 enable this Committee to issue a certificate of
22 environmental compatibility?

23 A. Yes, I do.

24 MR. CROCKETT: Thank you. That's all the
25 questions I have of Mr. McDaniel, and if members of

1 the Committee would like to --

2 THE WITNESS: One more slide, Webb. This is
3 to show what our commitment to the Town is. We've got
4 it over there on the board, and we welcome you to come
5 look at it. This will be the entrance sign to the
6 project.

7 On the left there it shows an archaeological
8 type bear to show the old. And then the Gila River
9 with the Panda on the right. And at the bend of the
10 river is the logo of the Town of Gila Bend. And as we
11 go to develop this project, the cobblestones in that
12 river will be placed by the community to get a buy-in
13 on the project just to tell them, hey, they're helping
14 us to develop this project, also. And this will be an
15 entrance sign to the project.

16 MR. CROCKETT: Thank you.

17 That concludes his direct.

18 CHMN. PIERSON: Any questions at this time?

19 (No response.)

20 CHMN. PIERSON: Thank you. Proceed.

21

22

23

24

25

1 JENNIFER TRIPP,
2 called as a witness, having been previously duly
3 sworn, was examined and testified as follows:
4

5 DIRECT EXAMINATION
6

7 Q. (BY MR. CROCKETT) Ms. Tripp, would you
8 please state your name and business address.

9 A. My name is Jennifer Tripp. My business
10 address is 2201 East Camelback Road, Suite 115B,
11 Phoenix, Arizona 85016.

12 Q. Who are you employed by and in what capacity?

13 A. I'm a principal of R. W. Beck specializing in
14 transmission services.

15 Q. Would you briefly describe R. W. Beck for us.

16 A. R. W. Beck is a management consulting firm
17 founded in 1942 to provide engineering and consulting
18 services to the utility industry. The largest aspect
19 of our business is services to the electric power
20 industry. In that regard, our clients consist
21 predominantly of financial institutions, legal firms,
22 developers, municipalities and other utilities and
23 other public and private sector clients. R. W. Beck
24 is a firm recognized by the financial community in
25 providing financial and engineering reviews.

1 there with Glen Canyon and other hydro plants, large
2 projects that could produce a large amount of
3 megawatts.

4 Nuclear, we have Palo Verde, and we all know
5 what the issues associated with nuclear generation
6 are, as well.

7 Coal, which you have a lot of up in the
8 northern part of the state. Building new coal plants
9 is also limited right now because of environmental
10 issues and pollutants and such.

11 So gas falls next, and beyond that is oil.
12 And anybody that goes to the gas pumps in the last two
13 months knows what the price of oil has done.

14 We have looked at the industry, and although
15 that is not my area of expertise, the reserves have
16 been predicted to be adequate for North America, like
17 Jeff said, for the life of the project. Nobody can
18 control the price for short-term spikes or for
19 long-term spikes, but right now, there is not an
20 alternative to gas supply that could fill the need of
21 generation for the future.

22 MR. OLEA: And you have just one gas source
23 right now, one pipeline coming into the project?

24 MR. MCDANIEL: Yes. There's one pipeline
25 that will come down from the interconnect that -- El

1 Paso has two lines that go across the southern part of
2 the state, a 20-inch and a 30-inch. We'll be bringing
3 done a 24-inch pipe to connect to both of those lines.

4 MR. OLEA: So you'll have two of their lines.
5 So if one of theirs goes down, you still have gas
6 coming into the project?

7 MR. MCDANIEL: And there's an oil line. All
8 American has sold to El Paso, and that's going to be
9 converted to a natural gas line. That's the third
10 line that's in that same right-of-way. We'll probably
11 be tying into that line, also. So we'll have three
12 pipelines that will be connected to bring the lateral
13 down to the facility.

14 MR. OLEA: That's all I have.

15 CHMN. PIERSON: Anyone else?

16 MR. WAYNE SMITH: Paloma Ranch has property
17 in the immediate area. You didn't mention any -- as
18 far as their comments. And I think everybody knows
19 that they're attempting to develop their land in one
20 way or another, and I just wondered how that might
21 affect the property.

22 MR. MCDANIEL: I've met with I think it's Mr.
23 Smith. He's one of the principals of Paloma. I guess
24 not Paloma, but Southwest Agricultural Businesses, the
25 managers for Paloma. Also Jason Lipsey, who is the

1 direct person responsible for that. I've met with
2 them and keeping them involved. They're very excited
3 about what the project brings to help develop their
4 ideas.

5 The pipeline, we're negotiating right-of-way
6 through their property. They're encouraged about
7 that, also. And also the APS transmission line will
8 also cross their property. Again, they're excited
9 about that. So they've been very supportive.

10 The newsletter you got today, they get the
11 same interface with us, and they also share their
12 ideas and what they're doing to develop the site. So
13 there's a good interaction from the start of this
14 project with them.

15 MR. WAYNE SMITH: Where are they in relation
16 to this? Are they adjacent to?

17 MR. MCDANIEL: The main Paloma Ranch is to
18 the west.

19 MR. WAYNE SMITH: But they have another
20 property along --

21 MR. MCDANIEL: They have property scattered
22 all the way up along the Gila Bend Canal up to the
23 Gillespie area. They're trying to liquidate that
24 property and focus on the larger ranch to the west of
25 our property.

1 MR. WAYNE SMITH: Have you addressed that
2 with Maricopa County as to the potential land uses
3 that might occur on their properties directly north?

4 MR. MCDANIEL: I believe that was in Mr.
5 Bergdale's study area for the project.

6 MR. WAYNE SMITH: Was there any comments from
7 the County with reference --

8 THE WITNESS: They had no concerns about
9 that.

10 MR. WAYNE SMITH: No development plans?

11 THE WITNESS: They didn't have anything filed
12 with them yet, and they didn't have any concern,
13 although they're aware that Paloma Ranch is planning
14 to do something, obviously.

15 MR. WAYNE SMITH: I was just wondering if
16 Paloma addressed that as to how it impacted those
17 properties to the north of it because not only the
18 power lines but any other mitigations that might --

19 MR. MCDANIEL: In the application there's a
20 letter that states --

21 MR. WAYNE SMITH: I read the letters, and I
22 just didn't know if there was something much further
23 because there was nothing in here with reference to
24 the County's comments.

25 MR. MCDANIEL: We contacted SASI directly to

1 see what their plans were, and they're trying to
2 liquidate that property. They had no plans.

3 MR. WAYNE SMITH: I just didn't want this to
4 impact their future development plans for that land to
5 the north. I know the big ranch is a different issue.

6 MR. MCDANIEL: Nothing's been brought to our
7 attention.

8 CHMN. PIERSON: Anybody else?

9 MR. BERGER: I did have one I was just
10 curious about. You've done a great job in talking to
11 all the neighbors, but I see one that's missing. Have
12 you talked to the Tohono O'odham?

13 MR. MCDANIEL: I've met with the San Lucy
14 Village. Met with them several times. They again
15 were very excited about our project because they have
16 some skilled craft that do sheet metal work, so we're
17 developing a scope so they can be a participant in our
18 project.

19 MR. BERGER: And were they involved in any of
20 the studies that you might have done?

21 MR. MCDANIEL: They received the newsletters
22 and contacted just like everybody else in the
23 community, and I've also met with the chairman twice.
24 Again, went over the project with her. Very
25 encouraged, very supportive.

1 MR. BERGER: Thanks.

2 CHMN. PIERSON: All right. It's now 12:00.

3 Let's find out where we are -- I guess we know where
4 we are. Where are we going?

5 MR. CROCKETT: That completes the applicant's
6 case.

7 CHMN. PIERSON: And how long do you
8 anticipate your case will be?

9 MS. WOLFE: Our case will probably take about
10 40 minutes. I have cross-examination of approximately
11 a half an hour.

12 MR. SUNDIE: Mr. Chairman, you better explain
13 that to us because this says that you've already met
14 with the applicant and you have eight conditions on
15 here, I believe.

16 MS. WOLFE: Yes.

17 MR. SUNDIE: What are you going to do to
18 change any of this, to change any of the presentation
19 and to affect our decision if we're going to have to
20 spend another 40 minutes? I don't understand that.
21 Are you trying to make a point again? Where are you
22 going with it? You've already met with the applicant.

23 MS. WOLFE: Yes, we have. Staff would like
24 to establish the record fact-wise. This is the place
25 where the Staff has an opportunity.

1 MR. SUNDIE: Doesn't this do it?

2 MS. WOLFE: No, it doesn't.

3 MR. SUNDIE: Give us an idea of what kind of
4 questions you're going to ask that's not covered.

5 MS. WOLFE: As far as my cross-examination
6 questions?

7 MR. SUNDIE: Yes.

8 MS. WOLFE: I do have some cross-examination
9 questions related to the transmission that is not --
10 the transmission application has not been filed
11 concurrently with the generation application. And we
12 would just like to establish for the record the fact
13 that -- we believe after looking at transmission
14 studies that the transmission -- it looks to be
15 adequate, but there are certainly factual issues that
16 we would like to establish for the record just in
17 case --

18 MR. SUNDIE: Can't that be done when we have
19 to come back to the transmission system? We're going
20 to have to hear this twice, then? I'm sorry, but, you
21 know, this is an awful good application. They've done
22 their homework. And we have to come back to do the
23 transmission system. And you want us to sit here for
24 another 40 minutes to an hour and a half after you've
25 met with the applicant, and after you have to make

1 your case the next time. I would rather hear it next
2 time. I don't know how the rest of the Committee
3 feels.

4 CHMN. PIERSON: Well, Mr. Sundie, I was going
5 to ask that the company address a little bit more --
6 or address for the first time how we're going to get
7 their power to Phoenix. And I realize we don't have
8 the transmission application before us, but if it's
9 going through the Palo Verde grid, then we've got the
10 same problems that we've gone into very painfully and
11 lengthily with Harquahala and Arlington and the
12 others. And I think we were considering there, hey,
13 if you can't get your power to market under the
14 existing -- with the existing transmission lines, then
15 we were considering, do we grant the certificate. And
16 I think we've got to go into that at this point.

17 MR. SUNDIE: Mr. Chairman, our concern has
18 always been the transmission line to the plant, not
19 out of their switchyard. We've had the reliability
20 study published or done by the Salt River Project that
21 basically said whoever comes first gets on line first
22 and everybody else has to wait. I think that's
23 basically what it said --

24 CHMN. PIERSON: Well, the problem --

25 MR. SUNDIE: And back to my original thing,

1 is this an issue to be discussed in this hearing?

2 CHMN. PIERSON: Well, the problem is that the
3 studies that we looked at in Harquahala didn't put
4 Panda into the mix. They weren't one of the companies
5 that was in the mix. And it appeared that all the
6 transmission capacity was used up by those other
7 companies. So I want to find out how they think
8 they're going to get their power to market.

9 MR. SUNDIE: I think that's a valid question,
10 but I don't necessarily think that -- I'm still
11 concerned about Staff presenting their case twice.
12 We're going to have to sit here and listen to it
13 twice.

14 And as we know, we have 15 plants to site.
15 This is No. 7. This is a lot of work, and everybody
16 has done their homework here. Why are we prolonging
17 this case?

18 MS. WOLFE: Mr. Sundie, may I address that
19 from a legal standpoint. This is the proceeding in
20 which they have presented evidence. And if the
21 evidence is not subjected to cross-examination, you
22 may not have a full record upon which to base your
23 decision. And this is -- I hate to belabor this, but
24 this is the only fact finding proceeding that will
25 take place prior to a Commission decision on this

1 issue.

2 If evidence is precluded from the record and
3 this case for some reason goes to appeal, you'll have
4 everything right back before you because the judge
5 might throw it back eventually if it were appealed,
6 saying that the record was not adequate.

7 MR. CROCKETT: Mr. Chairman, may I make a
8 comment. As I pointed out earlier on, this is an
9 application for approval of siting of a plant. The
10 evidence that was testified to here today did mention
11 the interconnection and indicated that insofar as
12 transmission lines are concerned, that those
13 applications would be filed by another entity and that
14 this company is in the generation business and not in
15 the wires business.

16 And I would suggest that these are issues
17 that undoubtedly are going to rise in the context of a
18 line siting hearing concerning the siting of the
19 transmission facilities. And that once again, I would
20 submit that we really ought to be concerned with
21 generation issues and whether this plant and whether
22 this project is compatible with the requirements that
23 are set forth in the statute.

24 CHMN. PIERSON: Well, Mr. Crockett, I
25 understand why you want to persevere in that regard,

1 but I think I want to persevere in my feeling that if
2 there is not sufficient capacity to get this power to
3 market with the existing transmission system -- and
4 I'm not talking about your connection to Palo Verde,
5 that's not a problem -- then I have serious
6 considerations and my boss has serious considerations
7 about whether the plant should be sited.

8 I do not think -- I agree with Mr. Sundie. I
9 do not think that we need to go into anything involved
10 with the transmission lines that will be sited to get
11 this power to the Palo Verde switching station. That
12 can be adequately handled in the APS application. But
13 as for your ability to get it to market, I think
14 that's been a key issue for us in the last two
15 hearings. And the fact that you've separated it out
16 doesn't drop the issue.

17 MR. CROCKETT: Mr. Chairman, if you'll
18 remember, the evidence that was submitted by Ms. Tripp
19 in this case is that there's a significant generation
20 deficiency that is going to be experienced by this
21 Valley. And let's assume that there is some
22 congestion on transmission. I would assume that what
23 this Committee ought to be doing in connection with
24 the line siting proceedings is figuring out how best
25 to handle that congestion.